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No. 08-1173

IN THE

Supreme Court of the United States

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Petitioner,

v.

DALLAS AREA RAPID TRANSIT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC* that federal law does not create a cause of action "for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions." 457 U.S. 15, 29 (1982). Any such action must be filed under state law.

Properly considered, therefore, the Petition for a Writ of Certiorari asks this Court to consider the following question:

> Whether the Supreme Court of Texas properly held that federal law, by implication, does not preempt a state governmental entity's immunity from suit by a private party in state court and therefore does not confer jurisdiction upon state courts over such actions.

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REASONS FOR DENYING THE PETITION

Petitioner mischaracterizes the basic question presented by this case. The crucial question is not only whether Congress preempted, by implication, a state governmental entity's immunity from suit in enacting Section 13(c) of the Urban Mass Transit Act of 1964, as amended ("UMTA" or the "Act"),[1] but also, whether Congress can compel state courts to entertain state law claims over which the state courts have no jurisdiction as a matter of state law.

[1] UMTA is now known as the Federal Public Transportation Act, as amended. Section 13(c) of UMTA is codified at 49 U.S.C. § 5333(b).

The answer to this question can be found easily in Dallas Area Rapid Transit's ("DART") governmental immunity, as afforded by Texas state law, this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982) ("*Jackson Transit*"), and Congress' powers under the Constitution. As such, this case does not warrant a writ of certiorari.

The Supreme Court of Texas rightfully reversed the decision of the Court of Appeals for the Fifth District of Texas on the grounds that Section 13(c) of UMTA did not preempt, by implication, DART's immunity from suit under state law. This Court should let that decision stand.

I. Certiorari is not appropriate here because Petitioner's arguments are without merit. Neither the holding in *Jackson Transit*, this Court's constitutional precedent, nor Congress' constitutional authority permit Congress to override the immunity of governmental entities in state courts, by implication or otherwise.

Certiorari is not appropriate in this case because Petitioner's arguments lack merit. In light of the immunity granted to governmental entities under Texas state law, the holding of *Jackson Transit*, this Court's constitutional precedent, and the reach of Congress' constitutional authority, Petitioner's arguments do not diminish the correctness of the Texas Supreme Court's decision in the case below.

A. Texas state courts lack jurisdiction over DART as a political subdivision of the state of Texas and a governmental entity performing only governmental functions.

It is a fundamental rule of Texas jurisprudence that governmental immunity bars suits against governmental entities unless the Texas legislature has expressly waived that immunity by statute. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Governmental immunity has been the rule of law in Texas since before the Republic of Texas became the 28th state, *see Hosner v. DeYoung*, 1 Tex. 764 (1847); *Bd. of Land Comm'rs v. Walling*, Dallam 524 (Tex. 1843) (Republic of Texas), and the Texas legislature and Texas courts have adhered to the rule of governmental immunity for more than 150 years. Under Texas law, governmental immunity from suit "raises a jurisdictional bar" and "defeats a trial court's subject matter jurisdiction." *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999); *see Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Chambers v. State*, 261 S.W.3d 755, 757 (Tex. App. – Dallas 2008, pet. denied).

The Texas legislature codified the rule of governmental immunity in Section 311.034 of the Texas Government Code.[2] Section 311.034 preserves as

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[2] Section 311.034 provides:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of "person," as de-

the Texas legislature's "sole province" the ability to waive or abrogate governmental immunity, and Texas courts have "consistently deferred" to the Texas legislature to waive immunity from suit. *IT-Davy*, 74 S.W.3d at 854. The Texas legislature's reservation of control over state governmental immunity reflects the legislature's desire to "manag[e] state fiscal matters through the appropriations process," TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007), and Texas courts have agreed that the legislature is "better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear," *IT-Davy*, 74 S.W.3d at 854 (internal citations omitted).

In Texas, all agencies, political subdivisions, and other institutions derived from the Texas Constitution or the laws of the State of Texas enjoy governmental immunity. *Fowler v. Tyler Indep. Sch. Dist.*, 232 S.W.3d 335, 338 (Tex. App. – Tyler 2007, pet. denied); *see also Cranford v. City of Pasadena*, 917 S.W.2d 484, 487 (Tex. App. – Houston [14th Dist.] 1996, no writ).

DART is a Texas regional transportation authority authorized by and existing pursuant to Chapter 452 of the Texas Transportation Code. DART is a political subdivision of the State of Texas. *Stephens v. Dallas*

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fined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007).

Area Rapid Transit, 50 S.W.3d 621, 632-33 (Tex. App. – Dallas 2001, pet. denied). DART can perform only governmental functions, *see* TEX. TRANSP. CODE ANN. § 452.052 (Vernon 2007), and as a governmental entity performing only governmental functions, is entitled to governmental immunity, *see Port of Houston Auth. v. Guillory*, 814 S.W.2d 119, 122 (Tex. App. – Houston [1st Dist.] 1991), *aff'd*, 845 S.W.2d 812 (Tex. 1993). DART receives funding from several sources, including grants, bond revenues, passenger fares, and local sales and use tax revenues. *See* TEX. TRANSP. CODE ANN. §§ 452.055, 452.061, 452.352, & 452.401 (Vernon 2007). Therefore, DART, as a political subdivision of the State of Texas and a governmental entity performing only governmental functions, is entitled to assert governmental immunity from suit unless the Texas legislature has clearly and unambiguously waived DART's immunity.[3] DART's governmental immunity divests the Texas state courts of subject-matter jurisdiction over suits initiated against DART based on Texas state law.[4]

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[3] DART enjoys governmental immunity from suits on state law claims in Texas state courts, *see Tex. Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist.*, 221 S.W.3d 732, 734 (Tex. App. – San Antonio 2007, no pet.) ("Sovereign immunity protects the State from lawsuits for money damages . . . Unless expressly waived, its political subdivisions are also entitled to such immunity, referred to as governmental immunity.") (internal citations omitted), even though DART cannot claim Eleventh Amendment immunity from suits on federal law claims, *see Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001) (finding that DART is not an "arm of the state" for purposes of Eleventh Amendment immunity).

[4] In Texas, immunity from suit defeats a trial court's subject-matter jurisdiction, *Whitley*, 104 S.W.3d at 542 & 544, and is

B. Congress cannot compel state courts to entertain state law claims over which the state courts would have no jurisdiction as a matter of state law.

1. Congress has the authority to create federal causes of action and federal remedies cognizable in both federal and state courts and prescribe the reaches of federal court jurisdiction within the confines of Article III.

Congress has the power to create federal causes of action and provide remedies for violations of federal law, so long as Congress' exercise of creative authority comports with its delegated powers under the Constitution. *See Griffin v. Breckenridge*, 403 U.S. 88, 95 (1971); *cf. United States v. Morrison*, 529 U.S. 598, 613 (2000) (Congress could not provide a federal remedy for gender-motivated crime pursuant to its power to regulate interstate commerce). And under the Supremacy Clause, state courts must respect and enforce validly created federal causes of action in cases properly before them. *See* U.S. CONST. art. VI; *Testa v. Katt*, 330 U.S. 386, 394 (1947) (state courts may not refuse to hear a federal claim if "th[e] same type of claim arising under [state] law would be enforced by that State's courts").

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properly asserted in a plea to the jurisdiction, *Tex. Dep't of Transp.*, 8 S.W.3d at 638-39. Here, DART filed a plea to the jurisdiction, which the District Court, 191st Judicial District, Dallas County, Texas, denied. DART appealed the District Court's denial of the plea to the jurisdiction to the Court of Appeals for the Fifth District of Texas, and then appealed the Court of Appeals' affirmance of the District Court's denial to the Texas Supreme Court.

Congress also has the constitutional authority to prescribe the reaches of federal court jurisdiction within the confines of Article III. *See* U.S. CONST. art. I, § 8; *id.* art. III, § 1. Congress' power to define federal court jurisdiction, and in particular circumstances, grant exclusive federal court jurisdiction for federal claims, does not lessen the authority of the States to define the jurisdiction of their own courts. As is evident from the "dual sovereignty" structure of our government, the Framers did not alienate the power of state courts by creating the federal government or the federal judiciary. *See* THE FEDERALIST No. 82, at 450-51 (A. Hamilton), in ALEXANDER HAMILTON, JOHN JAY, JAMES MADISON, ET AL., THE FEDERALIST & OTHER CONSTITUTIONAL PAPERS (E. H. Scott ed., 1898):

> The only thing in the proposed Constitution, which wears the appearance of confining the causes of Federal cognizance, to the Federal courts, is contained in this passage: "The *judicial power* of the United States *shall be vested* in one supreme court, and in *such* inferior courts as the Congress shall from time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes, to which their authority is to extend: or simply to denote, that the organs of the National Judiciary should be one supreme court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the

> concurrent jurisdiction of the State tribunals: and as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.

Rather, state courts retain the jurisdiction they enjoyed prior to the ratification of the Constitution and can exercise concurrent jurisdiction with the federal courts over federal claims, except where Congress determines that federal jurisdiction should be exclusive. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990); *Bowles v. Willingham*, 321 U.S. 503, 511-12 (1944); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867) (Congress has power to create exclusive federal jurisdiction).

2. Congress' powers do not authorize Congress to expand state court subject-matter jurisdiction for purely state law causes of action.

State law, not federal law, governs the subject-matter jurisdiction of state courts. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). In appropriate circumstances, Congress may *divest* the state courts of subject-matter jurisdiction to hear federal claims. But in most cases, the Framers intended that Congress not be able to unduly intrude upon the general jurisdiction of state courts. *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 (1962) ("those limitations implicit in the rubric 'case or controversy' . . . spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts") (internal citation omitted); *see Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 790 (1991) (Blackmun, J., dissenting) ("federal intrusion into state authority is the unusual case").

Congress' lack of authority over state court jurisdiction is evident in light of this Court's decisions in the area of concurrent federal-state jurisdiction over federal claims. This Court has established that state courts may not deny enforcement of federal claims if the state courts have "jurisdiction adequate and appropriate under established local law" to adjudicate the federal claims. *Testa*, 330 U.S. at 394. However, the States have no obligation to create courts "competent" to hear federal claims to fulfill their duty to enforce federal law as the supreme law of the land. *See Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."). If Congress cannot require the state courts to enforce federal claims if the state courts do not have "jurisdiction adequate and appropriate" under state law to hear such claims, Congress certainly cannot require state courts to enforce purely state law claims if the state courts do not have subject-matter jurisdiction under state law to hear those claims.

Here, Petitioner is asking this Court to consider an argument that would require the Court to hold that Congress can enlarge the subject-matter jurisdiction of the Texas state courts by implied intent. Just as the Framers would not have wanted to strip the state courts of the jurisdiction they enjoyed before the ratification of the Constitution, the Framers would not support a federal imposition of subject-matter jurisdiction on state courts for state law claims, where the federally imposed jurisdiction would be inimical to the state courts' jurisdiction as defined by state law.

C. Congress has ample means at its disposal to ensure compliance with federal law, including creating federal causes of action and conditioning the receipt of federal monies on concessions from the States, but chose not to employ those options to ensure compliance with Section 13(c) of the Act.

Congress has ample means at its disposal to ensure compliance with federal law and safeguard against potential negative effects of new legislation. Among other things, Congress may provide federal causes of action to remedy conduct that it seeks to deter in legislation, and in the context of bills appropriating federal funds, Congress may condition the receipt of the funds on the recipient's agreeing to take actions that Congress otherwise could not require the recipient to take, *see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (Congress may "in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take").

In enacting UMTA, Congress was concerned that the de-privatization of transportation systems would adversely affect the collective-bargaining rights of transit workers. *See Jackson Transit*, 457 U.S. at 17 (Congress included Section 13(c) in an attempt to "prevent federal funds from being used to destroy the collective-bargaining rights of organized workers") (citing H.R. Rep. No. 204, 88th Cong., 1st Sess., 15-16 (1963)). To guard against that result, Congress conditioned the receipt of UMTA monies on the recipient's compliance with Section 13(c) of the Act. Section 13(c) requires that the recipient make "fair and equitable"

arrangements (hereinafter referred to as "Section 13(c) arrangements"), certified as such by the Secretary of Labor, to protect the "interests of employees affected by the assistance." 49 U.S.C. § 5333(b)(1).

1. Congress could have, but did not, create a federal cause of action for Section 13(c) violations.

Congress may create federal causes of action as remedies for conduct that Congress seeks to deter in legislation. In UMTA, Congress did not create a federal cause of action "for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions." *Jackson Transit*, 457 U.S. at 29. Instead, Congress chose to rely on state law and the state courts to govern the labor relations between parties to Section 13(c) arrangements. *Id.* at 24 ("Congress intended that labor relations between transit workers and local governments would be controlled by state law.").

When Congress chooses to rely on state law to provide remedies for aggrieved parties and does not provide a federal forum for the resolution of disputes, it must take the state law, the state courts, and the subject-matter jurisdiction of the state courts as it finds them. *See Howlett*, 496 U.S. at 372 ("The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'") (internal citations omitted). If Congress could not tolerate the possibility that state law would deny transit employees the option of suing local governments in state courts on state law claims, Congress had "ample power" under Articles I and III of the Constitution to "enact a suitable solution." *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S.

249, 260 n.17 (1977) (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 216 (1971)). Congress could have provided a federal remedy and a federal forum for aggrieved parties to Section 13(c) arrangements. Congress did not do so.

2. Congress could have, but did not, condition the receipt of UMTA funds on the state entity's waiver of its right to assert immunity from suit in actions involving Section 13(c) in state court.

Incidental to its powers under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, Congress "may attach conditions on the receipt of federal funds" to "further [its] broad policy objectives" for particular legislation.[5] *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal citations omitted). Because legislation enacted under the Spending Clause is "much in the nature of a contract" between Congress and the States, the "legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted). Congress must "unambiguously" set out the conditions that it intends to attach to a State's acceptance of federal funds because "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington*

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[5] The "mere receipt of federal funds cannot establish that a State has consented to suit." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (internal citations omitted), *not followed on other grounds by Alden v. Maine*, 527 U.S. 706 (1999).

Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (internal citations omitted).

If Congress so desired, it could have conditioned the receipt of UMTA monies on the state entity's waiver of immunity and guarantee of a state court forum for the resolution of disputes between parties to Section 13(c) arrangements.[6] It did not do so. Instead, Congress chose to condition the receipt of UMTA funds on the state entity entering into an approved agreement to preserve the transit workers' collective-bargaining rights. Section 13(c) only requires that the state entity make "fair and equitable" arrangements to protect the "interests of employees affected by the assistance." 49 U.S.C. § 5333(b)(1). Nothing in Section 13(c) ambiguously or unambiguously conditions the receipt of UMTA monies on the state entity's consent to suit by transit workers or their representative unions in either state or federal court, and neither Petitioner nor this Court can imply Congress' intent to impose such a condition on the receipt of UMTA funds.

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[6] Congress does not have unlimited power to impose conditions on the receipt of federal funds. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. at 211 ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'") (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). We take no position on whether the imposition of a condition in Section 13(c) requiring that the States waive state governmental immunity for suits in state courts involving Section 13(c) claims would be appropriate under or within the limits of Congress' Spending Clause power.

3. Congress did not express an intent to abrogate state governmental immunity in Section 13(c), and as with congressional abrogation of Eleventh Amendment immunity, a congressional intent to abrogate state governmental immunity for purely state law claims should not be implied.

In the context of the sovereign immunity of a State itself under the Eleventh Amendment, Congress must clearly express its intent to abrogate that immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) ("Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'") (citing *Blatchford*, 501 U.S. at 786); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (clear statement is required to compel States to entertain damages suits against themselves in state courts). Even outside the specific confines of the Eleventh Amendment of the Constitution, Congress should not be held to a lesser standard of clarity of intent when seeking to subject state entities to suits. Sovereign immunity is an important constitutional principle that has at its foundation the right of the people to control, through their elected representatives, the power to tax and spend their money. Under our dual system of sovereignty, *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (U.S. 2009) (Thomas, J., concurring); *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002), that principle cannot, and should not, be eroded by implication.

UMTA, and Section 13(c) in particular, contain no expression of congressional intent to override state

laws giving immunity to state governmental entities. *See generally* Urban Mass Transit Act of 1964, as amended, 49 U.S.C. §§ 5301-5330, 5332-5338. The Act contains no reference to the Eleventh Amendment, sovereign immunity, governmental immunity, or suits in state courts.[7] The absence of any abrogation language in UMTA and in Section 13(c) of UMTA is conclusive evidence that Congress did not intend to abrogate state laws giving immunity to state governmental entities through UMTA.

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[7] Congress knows how to express its intent to abrogate sovereign immunity in federal statutes, *see, e.g.*, 15 U.S.C. § 1122(b) (States "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person ... for any violation under this chapter."); 25 U.S.C. § 2710(d)(7)(A)(i) (vesting jurisdiction in federal courts over "any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith"); 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of the requirements of this chapter. . ."), and previous decisions of this Court recognize Congress' knowledge and fulfillment of its burden to clearly express its intent to abrogate, *see, e.g., United States v. Georgia*, 546 U.S. 151, 154 (2006) (Americans with Disabilities Act contains an "unequivocal expression of [Congress'] intent to abrogate state sovereign immunity"); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (finding that Congress' expression of its intent to abrogate the States' sovereign immunity in the Americans with Disabilities Act was clear and unequivocal); *Seminole Tribe*, 517 U.S. at 56-57 (recognizing that Congress provided an "'unmistakably clear' statement of its intent to abrogate" in the Indian Gaming Regulatory Act). The burden on Congress should be the same when and if Congress intends to abrogate state governmental immunity for state law causes of action pursuant to a federal scheme, assuming that Congress has the constitutional authority to do so.

II. Certiorari is not appropriate here because Petitioner's argument already has been addressed and answered, there is no uncertainty concerning *Jackson Transit's* application and the implications of its holding, and Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional precedent.

A. Certiorari is not warranted here because the Court already addressed and answered Petitioner's argument in *Jackson Transit*.

Jackson Transit is not ambiguous in what it stands for, how it should be interpreted, and the situations to which it properly applies. In *Jackson Transit*, the Court held that Section 13(c) did not "create federal causes of action for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions," 457 U.S. at 29, and stated that "Congress intended that labor relations between transit workers and local governments would be controlled by state law," *id.* at 24. Since that pronouncement, the state and lower federal courts have taken this Court at its word and have applied state law to claims by transit workers and unions against state transit agencies based on Section 13(c) arrangements. *See, e.g., Burke v. Utah Transit Auth.*, 462 F.3d 1253, 1258 (10th Cir. 2006) (no jurisdiction to consider claims involving Section 13(c) arrangement); *City of Beloit v. Local 643 of the Am. Fed'n of State, County & Mun. Employees, AFL-CIO*, 248 F.3d 650, 653 (7th Cir. 2001) (affirming dismissal for lack of subject-matter jurisdiction); *Greenfield & Montague Transp. Area v. Donovan*, 758

F.2d 22, 25-26 (1st Cir. 1985) (no federal question jurisdiction); *Stockton Metro. Transit Dist. v. Div. 276 of the Amalgamated Transit Union, AFL-CIO*, 183 Cal. Reptr. 24, 28 (Cal. Ct. App. 1982); *Office & Prof'l Employees Int'l Union, Local 2 (AFL-CIO) v. Mass Transit Admin.*, 453 A.2d 1191, 1195 n.4 (Md. 1982); *Finocchi v. Greater Cleveland Reg'l Transit Auth.*, 620 N.E.2d 872, 876 (Ohio Ct. App. 1993); *Amalgamated Transit Union, ATU Local 168 v. County of Lackawanna Transit Sys.*, 678 A.2d 1225, 1230 (Pa. Commw. Ct. 1996) (applying state arbitration law); *City of Madison v. Local 311, Int'l Ass'n of Firefighters, AFL-CIO*, 394 N.W.2d 766, 769 (Wis. Ct. App. 1986) ("Respectable authority exists for the proposition that sec. 13(c) of UMTA does not preempt state law.") (internal citations omitted).

The state and lower federal courts have applied *Jackson Transit* consistently for almost thirty years. They have neither questioned nor expanded upon the *Jackson Transit* holding – that state law, not federal law, governs claims under arrangements and agreements made pursuant to Section 13(c) – and no state supreme court has read *Jackson Transit* to mean that Congress intended to override state governmental immunity in enacting UMTA. In fact, the opinions below – those of the Texas Supreme Court and the Court of Appeals for the Fifth District of Texas – are the *only* opinions that have directly considered Petitioner's novel application of *Jackson Transit*. And even the original ruling of the Court of Appeals for the Fifth District of Texas failed to identify any directly relevant authority when it concluded incorrectly that UMTA preempted state governmental immunity law. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 173

S.W.3d 896 (Tex. App. - Dallas 2005), *rev'd*, 273 S.W.3d 659 (Tex. 2008).

Still, Petitioner makes the novel assertion that *Jackson Transit* means that Congress *impliedly* preempted state governmental immunity simply because it provided that state law, rather than federal law, would govern the claims of aggrieved parties under Section 13(c) arrangements.[8] However, this Court in *Jackson Transit* did not hold that unions and transit workers could sue state transit agencies in state courts without regard to certain state laws. The holding of *Jackson Transit* and the state supreme and lower federal courts' consistent application of that holding over the last twenty-seven years do not support the reading that Petitioner seeks to ascribe to it. *Jackson Transit's* conclusion answers Petitioner's argument. State law, regardless of form or consequence, applies to claims involving Section 13(c) arrangements.

B. Certiorari is not warranted here because Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional precedent, and thus Petitioner's concerns are more properly directed to Congress if and when Congress deems state governmental immunity an obstacle to the protection of state transit workers' rights.

Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional

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[8] Petitioner relies on the Court's dicta, in a footnote, to support its argument. Pet. at 13; *see Jackson Transit*, 457 U.S. at 29 n.13.

precedent. Petitioner suggests that Congress has the authority to preempt, or more appropriately to abrogate, a state governmental entity's immunity from suit *by implication*, and thereby determine the jurisdiction of state courts. Sovereign immunity, whether state sovereign immunity protected by the Eleventh Amendment or state governmental immunity, is an important constitutional principle and a bedrock of our dual system of sovereignty that cannot be eroded by implied congressional intent.[9] Congress does have the power to abrogate the governmental immunity of the States' political subdivisions by creating a federal cause of action, but did not do so in Section 13(c). For the relief that Petitioner seeks, Petitioner must direct its argument to Congress, not to this Court.

Congress is not so unaware of the fundamental principle of state governmental immunity as to require that it be removed by mere implication. UMTA's legislative history is replete with congressional testimony concerning the impact of the Act on transit workers' collective bargaining rights. Knowing surely of both state governmental immunity and threats to workers' rights, Congress affirmatively chose to let state law, rather than federal law, control those rights, subject to agreed-upon Section 13(c) arrangements. *See Jackson Transit*, 457 U.S. at 24.

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[9] Although this is not an Eleventh Amendment case, the requirement that Congress clearly and unequivocally express its intent to abrogate the States' Eleventh Amendment immunity from suit, *see Seminole Tribe*, 517 U.S. at 55 ("Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'") (citing *Blatchford*, 501 U.S. at 786), should apply with equal force when and if Congress intends to abrogate state governmental immunity for state law causes of action brought in state courts, assuming that Congress has the constitutional authority to do so.

The absence of any discussion of, or proposed remedy for, the rights of transit workers in states where governmental entities might be afforded immunity from suit strongly suggests that Congress did not regard immunity from suit as an obstacle to the protection of transit workers' rights. *See Wyeth*, 129 S. Ct. at 1200. The Act's legislative history shows Congress' intent to protect state transit workers' bargaining rights by requiring recipients of UMTA funds to preserve those workers' rights, not to guarantee transit workers a state judicial forum to resolve their disputes regardless of state governmental immunity. Both the legislation itself and the basic structural divisions of our federal system direct Petitioner's concerns to Congress to consider if and when state immunity law poses an obstacle to the achievement of Congress' objectives in enacting UMTA.

III. Certiorari is not appropriate here because Petitioner failed to pursue available administrative remedies.

Granting of certiorari in this case is also inappropriate because Petitioner has failed to pursue available administrative remedies. Petitioner and DART are parties to a Section 13(c) arrangement that the Secretary of Labor has concluded is fair and equitable. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 669 (Tex. 2008). As noted by the Texas Supreme Court, DART conceded "that it would not be immune from suit by [Petitioner] to require that the grievance procedures laid out in the Arrangement be fol-

lowed."[10] *Id.* However, Petitioner is not seeking to enforce these procedures. Rather than follow the administrative process outlined in the parties' Section 13(c) arrangement, Petitioner filed this lawsuit seeking money damages. The Texas Supreme Court properly described the administrative process that Petitioner failed to exhaust as follows:

> [A] hearing must be conducted, and if the grievance is not resolved, a fact-finding process ensues. But the end result of that process is an arbitration panel's report and recommendations that are expressly "advisory only" and not binding on either party. The report must be published in the local media, suggesting that the parties' recourse is then through political processes.

Id. at 670.

The Texas Supreme Court properly concluded that Petitioner is seeking to set aside DART's governmental immunity under Texas law to pursue something that neither Section 13(c) nor the parties' Section

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[10] State governmental immunity serves to protect governmental entities from suits for money damages. *See City of Houston v. Houston Firefighters' Relief & Ret. Fund*, 196 S.W.3d 271, 277 (Tex. App. - Houston [1st Dist.] 2006, no pet.). But governmental immunity from suits for money damages does not foreclose all remedies for an aggrieved party. Texas law permits aggrieved parties to initiate actions for certain types of equitable relief against governmental entities, including writs of mandamus, *see M.D. Anderson, Jr. v. City of Seven Points*, 806 S.W.2d 791 (Tex. 1991), and declaratory judgment actions, *see City of Houston*, 196 S.W.3d at 277; *IT-Davy*, 74 S.W.3d at 859-60. However, an aggrieved party cannot "circumvent the doctrine of governmental immunity simply by characterizing a suit for money damages, such as a contract dispute, as a declaratory judgment action." *City of Houston*, 196 S.W.3d at 277; *see IT-Davy*, 74 S.W.3d at 860.

13(c) arrangement gave it, i.e., the right to pursue a lawsuit against DART for money damages. The holding of the Texas Supreme Court does not deprive the Petitioner of the procedural rights described in the parties' Section 13(c) arrangement. Petitioner has simply elected not to pursue those administrative processes.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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